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FILED
JUL 26 1994
OFFICE OF THE CLERK

No. 93-1836

In the Supreme Court of the United States

OCTOBER TERM, 1994

CAROL C. PEELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
YOEL TOBIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

13 pp

QUESTIONS PRESENTED

1. Whether petitioner had a constitutional right to the effective assistance of counsel more than three years before the institution of adversary judicial proceedings against her.

2. Whether the panel that decided petitioner's appeal was selected in a manner that violated the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-16) is unreported, but the decisions are noted at 9 F.3d 104 (Table) and 15 F.3d 181 (Table). The findings of the district court (Pet. App. 137-145, 178-179) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17-18) was entered on January 19, 1994. A petition for rehearing was denied on February 16, 1994. Pet. App. 19-20. The petition for a writ of certiorari was filed on May 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Northern District of Texas to one count of willfully aiding in the filing of a false income tax return, in violation of 26 U.S.C. 7206(2). She was sentenced to five years' probation, fined $100,000, and ordered to pay restitution. Approximately three years later, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals affirmed. Pet. App. 5-6.

1. Petitioner was the president of a corporation that traded government securities. Petitioner helped backdate documents on certain trades and then helped prepare a federal income tax return that falsely claimed more than $1 million in losses and interest expenses from the backdated transactions. Petitioner knew that the losses could not be legally claimed. Pet. App. 102-108.

After the IRS began an investigation of petitioner's corporation in 1984, she retained Darrell Jordan to represent her. In December 1985, an Assistant United States Attorney allegedly conveyed to Jordan an offer of transactional immunity for petitioner in exchange for petitioner's cooperation in the investigation. Petitioner was not informed of the alleged offer, and any such offer was withdrawn by late January 1986. Pet. App. 12-13.

Approximately three years later, in January 1989, petitioner was indicted. In March 1989, she pleaded guilty to one count of willfully aiding in the filing of a false income tax return. In April 1992, petitioner filed a motion for post-conviction relief, asserting that Jordan's failure to transmit the alleged immunity offer to her violated her Sixth Amendment right to effective assistance of counsel. Pet. App. 12-13.

2. The district court referred the motion to a magistrate judge who recommended denying the requested relief. While there was a sharp dispute about whether the government ever made an offer of immunity for petitioner to Jordan, the magistrate judge found it unnecessary to resolve that issue. Pet. App. 12 n.1. The magistrate judge concluded that petitioner had no right to counsel before her indictment, and thus no preindictment right to the effective assistance of counsel. *Id.* at 14. The district court adopted the magistrate judge's findings and conclusions and denied petitioner's motion. *Ibid.*

3. Without hearing oral argument, the court of appeals affirmed. The court noted that "[i]t is well-established that where there is no constitutional right to counsel there can be no deprivation of effective assistance." Pet. App. 6. The court further observed that "a defendant's right to counsel attaches only once adversary *judicial* proceedings are initiated against her." *Ibid.* Because the events about which petitioner complained occurred more than three years before adversary judicial proceedings were commenced against her, the court concluded that petitioner had "failed to state a claim for deprivation of effective assistance of counsel." *Id.* at 6-7.

Petitioner also argued that Jordan's failure to inform her of the alleged immunity offer violated the Due Process Clause of the Fifth Amendment. The court, however, refused to address that claim. It explained that because petitioner had raised that argument for the first time in her objections to the magistrate judge's report, it was not "properly before the district court." Pet. App. 7.

4. The court of appeals panel consisted of only two judges. The third member of the panel had recused himself and the case was decided by a quorum pursuant

to 28 U.S.C. 46(d). Pet. App. 8 n.**. Petitioner filed a petition for rehearing on the ground that Fed. R. App. P. 34 provides that only a panel consisting of three judges may decide a case without oral argument. Pet. 27-28. The panel granted the petition, vacated the quorum opinion, and ordered the case resubmitted to a three-judge panel. Pet. App. 9-10. A three-judge panel then affirmed the district court's decision, issuing an opinion that was identical to the opinion issued by the two-judge panel. *Id.* at 11-16.

ARGUMENT

1. Petitioner contends (Pet. 8-18) that, even if she had no right to counsel at the time of the alleged immunity offer, she nonetheless had a right to effective assistance from the lawyer she retained. This Court's decision in *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982), disposes of that contention. There, a defendant claimed that his attorney's failure to file a timely petition for certiorari in the State's highest court violated his right to the effective assistance of counsel. This Court held that because a defendant does not have a right to counsel to pursue discretionary state appeals, "he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." *Ibid.*

Cases after *Torna* have reaffirmed its holding that persons have a constitutional right to the effective assistance of counsel only when they have a right to counsel in the first place. In *Evitts* v. *Lucey*, 469 U.S. 387, 396-397 & n.7 (1985), this Court held that because the Due Process Clause guarantees a right to counsel in first appeals, it also guarantees a right to the effective assistance of counsel in those appeals. This Court explained that "[o]f course, the right to effective

assistance of counsel is dependent on the right to counsel itself." *Ibid.* More recently in *Coleman* v. *Thompson*, 111 S. Ct. 2546, 2566 (1991), this Court held that, because there is no constitutional right to an attorney in state post-conviction proceedings, a federal habeas petitioner cannot claim that he was deprived of effective assistance of counsel in those proceedings. The Court reiterated that "where there is no constitutional right to counsel there can be no deprivation of effective assistance." *Ibid.*

Petitioner contends (Pet. 9-11) that *United States* v. *Gouveia*, 467 U.S. 180 (1984), casts doubt on the holding in *Torna*. There, this Court held that prison inmates did not have a right to counsel before the initiation of adversary judicial proceedings against them. *Id.* at 192. In a footnote, this Court noted that the inmates had not asserted a Sixth Amendment ineffectiveness claim. *Id.* at 185 n.1. Petitioner contends that if the Sixth Amendment rights to counsel and effective assistance of counsel were coextensive, the footnote would be "meaningless surplusage." Pet. 11. Petitioner reads far too much into the footnote. That footnote simply described the limited nature of the claim that the inmates in that case were asserting. It did not purport to overrule *Torna*. Moreover, as discussed above, this Court has twice reaffirmed the holding in *Torna*. See *Evitts*, *supra*; *Coleman*, *supra*. Both of those cases were decided after *Gouveia*.

Petitioner alternatively contends that under the "peculiar facts of her case" she had a Sixth Amendment right to counsel at the time of the alleged immunity offer. Pet. 10 n.3. As this Court has repeatedly held, however, "[t]he Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings." *Davis* v. *United States*, No. 92-1949, slip

op. 4 (June 24, 1994); see also *Moran* v. *Burbine*, 475 U.S. 412, 429-431 (1986); *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984). In this case, the alleged offer of immunity occurred more than three years before the commencement of adversary proceedings against petitioner. Accordingly, petitioner had no Sixth Amendment right to counsel at the time of that alleged offer.

Contrary to petitioner's claim, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), does not support a contrary conclusion. Although *Escobedo* relied on the Sixth Amendment in holding unconstitutional police questioning of a suspect who had been denied the right to consult with his attorney, that case has since been interpreted as protecting the Fifth Amendment privilege against compulsory self-incrimination. *Moran* v. *Burbine*, 475 U.S. at 429-430. This Court's decisions after *Escobedo* "foreclose any reliance [on it] for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings." 475 U.S. at 429.

Petitioner also contends (Pet. 18-21) that she had a constitutional right to effective assistance under the Fifth Amendment's Due Process Clause. Petitioner first presented that claim, however, in her objections to the magistrate judge's report. For that reason, the court of appeals did not view the question as properly before it. Pet. App. 15. Because petitioner did not present her Fifth Amendment claim in a timely manner and the court of appeals did not address it, that claim is not properly presented here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).*

* Petitioner argues (Pet. 22 n.8) that her Fifth Amendment claim was presented in a timely manner because 28 U.S.C.

In any event, the failure of petitioner's attorney to transmit the alleged immunity offer did not violate due process. In *Torna*, this Court rejected the defendant's analogous contention that his counsel's failure to file a timely petition for certiorari violated the Due Process Clause. This Court held that even assuming that a due process interest was implicated, any deprivation "was caused by his counsel, and not by the State." 455 U.S. at 588 n.4. Here, as in *Torna*, any deprivation petitioner may have suffered was caused by her attorney, and not by the government. See *Coleman* v. *Thompson*, 111 S. Ct. at 2566-2567 (attorney error is imputed to the government only when the government has a duty to provide competent counsel).

Petitioner contends (Pet. 20) that under *Evitts* v. *Lucey*, even if the government was not required to provide her with counsel, she had a right under the Due Process Clause to effective assistance from the lawyer she had retained. That contention is without merit. As previously discussed, *Evitts*' holding that the Due Process Clause guarantees a right to the effective assistance of counsel on first appeals was expressly predicated on the existence of a constitutional right to counsel on those appeals. 469 U.S. at 396 n.7, 397.

2. Petitioner contends (Pet. 26-28) that her right to due process of law was violated because two of the three judges who decided her case also sat on the original two-judge panel that ruled against her. In petitioner's view, those two judges could not be impartial because they had

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636(b)(1) provides for de novo review of a magistrate judge's decision. That statute, however, entitled petitioner to de novo review of the claims she raised before the magistrate judge. It did not authorize petitioner to assert new claims that were not presented to the magistrate judge.

already made up their minds about the substantive issues in the case. As this Court recently explained, however, "opinions held by judges as a result of what they [have] learned in earlier proceedings," are "not subject to deprecatory characterizations as 'bias' or 'prejudice.'" *Liteky* v. *United States*, 114 S. Ct. 1147, 1155 (1994). This Court emphasized that "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Ibid.* Similarly, "[j]udges sit as a matter of course on rehearings of their own decisions." *Edwards* v. *United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (en banc), cert. denied, 379 U.S. 1000 (1965). Thus, the fact that two of the judges who decided petitioner's appeal also sat on the original two-judge panel that ruled against her did not violate petitioner's right to due process of law.

Petitioner also contends that due process was violated because the third judge on the panel was selected by one of the two judges on the original panel. Pet. 29-30. As petitioner concedes, however, the record does not support her factual assertion concerning how the third judge was selected. Pet. 29 n.12. Even if the third judge were selected by one of the other two judges, however, that would not violate due process absent proof that the selection was made for an improper reason or the judge selected was biased. See *United States* v. *Claiborne*, 870 F.2d 1463, 1467 (9th Cir. 1989); *Cruz* v. *Abbate*, 812 F.2d 571, 574 (9th Cir. 1987); *United States* v. *Torbert*, 496 F.2d 154, 156 (9th Cir.), cert. denied, 419 U.S. 857 (1974). Petitioner has made no such showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
YOEL TOBIN
Attorneys

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